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8 Inc., a New York corporation; FUJIFILM Corporation, a
Japanese Corporation; and GE HEALTHCARE INC.,
a Delaware corporation.

9 UNITED STATES DISTRICT COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

12 ANTICANCER, INC., a California corporation,

13 Plaintiff and Counterclaim
14 Defendant,

v.

15 FUJIFILM MEDICAL SYSTEMS U.S.A., INC.,
16 d/b/a FUJIFILM LIFE SCIENCE, a New York
corporation; FUJIFILM CORPORATION, a
17 Japanese Corporation; GE HEALTHCARE INC.,
a Delaware corporation; and DOES 1-100,

18 Defendants.

12 Case No. 09-CV-1311-WQH (JMA)

13 **GE HEALTHCARE INC.'S REPLY TO**
ANTICANCER INC.'S OPPOSITION
TO MOTION TO DISMISS PURSUANT
TO FED. R. CIV. P. 12(B)(6)

14 Judge: Honorable William Q. Hayes
Courtroom: 4
Date: June 7, 2010
Time: 11:00 A.M.

15 **NO ORAL ARGUMENT UNLESS**
REQUESTED BY THE COURT

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INTRODUCTION

In opposing Defendant GE Healthcare Inc.'s ("GE Healthcare") Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), Plaintiff AntiCancer, Inc. ("AntiCancer") seeks to rely on conclusory legal assertions in its Second Amended Complaint as a substitute for the *factual* allegations required to survive a motion to dismiss. While AntiCancer acknowledges in its Opposition ("AntiCancer's Opposition") [D.E. 51] that federal pleading standards require that a complaint "allege *facts* sufficient to raise a 'right to relief above the speculative level'" (see AntiCancer's Opposition at 6, citing *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) (emphasis added)), the allegations of the Second Amended Complaint are nothing more than a formulaic recitation of the elements of a cause of action for indirect patent infringement. Controlling Supreme Court precedent is clear that allegations such as AntiCancer's are not sufficient under Federal Rule of Civil Procedure 8 to express a "plausible entitlement to relief." *Twombly*, 550 U.S. at 559; see also *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

14 Furthermore, AntiCancer's attempt to augment its deficient Second Amended Complaint
15 by referencing its Preliminary Infringement Contentions ("PICs") against GE Healthcare serves
16 only to confirm the lack of factual underpinnings for AntiCancer's conclusory allegations.
17 AntiCancer contends that its PICs "included substantial detail" regarding GE Healthcare's
18 allegedly infringing actions (*see* AntiCancer Opposition at 5), yet AntiCancer's Supplement of
19 GE Healthcare Stand-Alone Evidence [D.E. 51-5] reveals that the 239-page PICs include less
20 than four pages relating to GE Healthcare, and none of the "evidence" cited therein sets forth facts
21 that support a claim of infringement against GE Healthcare.

The sole *factual* allegation in the Second Amended Complaint relevant to AntiCancer's infringement claims is that GE Healthcare began to offer for sale accused Fujifilm image analyzers after this action was initiated against the Fujifilm defendants. Because AntiCancer has offered no further factual allegations of acts by GE Healthcare, and because AntiCancer further acknowledges that the mere sale of the accused Fujifilm image analyzers does not infringe the patents-in-suit, AntiCancer's claim that GE Healthcare induces and encourages infringement of the patents-in-suit is baseless. In addition, because AntiCancer has already been given two earlier

1 opportunities to amend its claims to include any facts it may be aware of relating to GE
 2 Healthcare, the Second Amended Complaint should be dismissed against GE Healthcare without
 3 leave to amend a third time.

4 **ARGUMENT**

5 **A. Governing Pleading Standards Require That Sufficient Facts Be Pled To**
 6 **Support Plaintiff's Claim For Relief**

7 As explained more fully in GE Healthcare's Motion to Dismiss, a complaint tested under
 8 Federal Rule of Civil Procedure 12(b)(6) must contain sufficient factual matter showing the
 9 grounds for relief. *See Ashcroft v. Iqbal*, 129 S. Ct. at 1949; *Bell Atlantic v. Twombly*, 550 U.S. at
 10 555.¹ While a complaint does not need to plead evidence, it must plead more than "labels and
 11 conclusions" and "a blanket assertion[] of entitlement to relief." *Twombly*, 550 U.S. at 555, 556
 12 n.3. For that reason, when considering a motion to dismiss, a court should first identify those
 13 allegations that are bare legal conclusions, which cannot be presumed true, and should then
 14 address any well-pled, non-conclusory factual allegations to determine whether the plaintiff
 15 has "nudged [its] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at
 16 570; *Iqbal*, 129 S. Ct. at 1950, 1951. In this regard, AntiCancer has pleaded nothing more than
 17 the elements of a claim for indirect patent infringement supported by the lone fact that GE
 18 Healthcare has begun to sell a Fujifilm image analyzer that AntiCancer contends is capable of
 19 being used to infringe the patents-in-suit.²

20 ¹ AntiCancer's assertion that the *Twombly* and *Iqbal* cases are "inapposite," and that GE
 21 Healthcare's reliance on the Supreme Court's decision in *Iqbal* fails, is flat wrong. *See Opposition*
 22 at 2, 14. Without question, the Supreme Court's decisions in these cases are binding precedent
 23 that set forth the controlling pleading standard under Federal Rule of Civil Procedure 8. *Moss v.*
U.S. Secret Service, 572 F.3d 962, 969, 972 (9th Cir. 2009) (holding that a complaint pleading
 24 only facts sufficient to suggest a possible, but not a plausible, claim "fails to satisfy *Twombly* and
Iqbal").

25 ² AntiCancer's reliance on Form 18 of the Appendix of Forms to the Federal Rules of Civil
 26 Procedure, which lays out a form complaint for *direct* patent infringement, is unavailing since
 27 AntiCancer has not also set forth factual allegations to support the legal statements outlined in
 28 Form 18. Furthermore, depending on Form 18, added to the Federal Rules before the Supreme
 Court's more recent decisions in *Twombly* and *Iqbal*, does not obviate the need to substantiate the
 legal assertions of a complaint with sufficient factual material. "While legal conclusions can
 provide the complaint's framework, they must be supported by factual allegations." *Iqbal*, 129 S.
 Ct. at 1950. On this point, AntiCancer's reliance on *McZeal v. Sprint Nextel Corp.* is not only
 equally unavailing but misleading as the plaintiff in that case appeared *pro se*, and thus was held
 to a "less demanding standard." 501 F.3d 1354, 1356 (Fed. Cir. 2007) (stating that the Supreme

As further explained in GE Healthcare's Motion to Dismiss, to state a claim for *either induced* infringement or *contributory* infringement under 35 U.S.C. §§ 271(b) and (c), respectively, AntiCancer would first need to allege facts showing the existence of direct infringement by some person or entity, a prerequisite for any indirect infringement claim. *See Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 774 (Fed. Cir. 1993). In addition, to plead a claim for *induced* infringement, AntiCancer would also need to allege *facts* showing: (i) that GE Healthcare knew of the patents-in-suit, and (ii) that GE Healthcare knowingly and actively aided and abetted the direct infringement with the specific intent to encourage the direct infringement. *See Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469 (Fed. Cir. 1990) (holding that "proof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement."). To plead a claim of *contributory* infringement, AntiCancer would need to allege facts showing direct infringement plus (i) that GE Healthcare knew that the image analyzers were especially made to practice the methods claimed by the AntiCancer patents, and (ii) that the image analyzers sold by GE Healthcare have no substantial non-infringing uses. *See 35 U.S.C. § 271 (c); Joy Techs., Inc.*, 6 F.3d at 774.

AntiCancer has not alleged—and cannot allege—*facts* to support *any* of the above elements of a claim for induced or contributory infringement.

B. AntiCancer Has Not Alleged Facts Sufficient to Avoid Dismissal

Throughout its Opposition, AntiCancer repeatedly cites the same allegations of the Second Amended Complaint, which AntiCancer contends are "facts" supporting its claims against GE Healthcare. However, upon closer review, these allegations amount to nothing more than bare legal conclusions. Specifically, AntiCancer references its allegations:

(i) that "GE Healthcare is marketing, selling, and offering for sale the Fujifilm image analyzers, and instructing its customers how to use the Fujifilm image analyzers so as to infringe the patents-in-suit[]" (see AntiCancer Opposition at 12

Court has "concluded that the pleadings of *pro se* litigants should be held to a lesser standard than those drafted by lawyers when determining whether the complaint should be dismissed for failure to state a claim. . ."). Notably, the Federal Circuit went on to state that "regardless of whether the plaintiff is proceeding *pro se* or represented by counsel, 'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" *Id.* (internal citations omitted).

1 citing the Second Amended Complaint at 10:23-25);

2 (ii) that GE Healthcare is infringing the patents-in-suit by "making, using, selling,
3 and offering for sale the Fujifilm and/or GE Healthcare image analyzers, i.e.,
4 devices which can and are be used [sic] to infringe one or more claims of the
5 patents-in-suit by GE Healthcare customers[]" (*Id.*, citing the Second Amended
Complaint at 11:9-14,12:9-14,13:9-14 (¶¶ 43,52,61));

6 (iii) that GE Healthcare "ha[s] infringed the [patents-in-suit] and encouraged
7 others to do so []" (*Id.* at 12, citing the Second Amended Complaint at 11:15-
17,12:15-17,13:15-17 (¶¶ 44,53,62)); and

8 (iv) that GE Healthcare is "actively inducing infringement and contributing to
9 infringement of the patents-in-suit by others[]" (*Id.* at 9, citing the Second
Amended Complaint at 11:20-23,12:20-23,13:20-23 (¶¶ 46,55,64)).

10 These allegations are nothing more than the "formulaic recitation of the elements" of
11 inducement of infringement and contributory infringement. Nowhere in its Opposition does
12 AntiCancer cite any factual allegation in its Second Amended Complaint aside from its allegation
13 that GE Healthcare has begun to sell Fujifilm image analyzers. *See* Second Amended at
14 Complaint at ¶ 37.³

15 Because the allegations of AntiCancer's Second Amended Complaint are devoid of factual
16 support, AntiCancer attempts to buttress its claims by relying on its PICs. *See* AntiCancer
17 Opposition at 2, 5.⁴ But, like the Second Amended Complaint, AntiCancer's PICs do not identify

18 ³ As support for its assertion that Fujifilm image analyzers are capable of performing the methods
19 claimed in the patents-in-suit, AntiCancer points to its allegations discussing a paper published by
20 Fujifilm, specifically "Application Note No. 6." *See* AntiCancer Opposition at 9, citing the
21 Second Amended Complaint at 9:3-4. However, the application note mentioned describes one of
22 the many non-infringing uses of the Fujifilm image analyzers, in particular the *in vivo* imaging of
23 a mouse bearing a tumor cell labeled with an antibody, *not* a fluorescent protein, as required by
the AntiCancer patents-in-suit. Regardless, these allegedly infringing actions of Fujifilm
occurred well before GE Healthcare entered the strategic alliance with Fujifilm, and thus cannot
be imputed to GE Healthcare.

24 ⁴ Contrary to AntiCancer's assertions, GE Healthcare's failure to mention AntiCancer's
25 Preliminary Infringement Contentions in GE Healthcare's Motion to Dismiss is not "willful
blindness." AntiCancer's Opposition at 1. Instead, it would have been improper for GE
26 Healthcare to rely on the PICs because a court's decision on whether to grant a motion to dismiss
must rest within the four corners of the complaint itself. *Coto Settlement v. Eisenberg*, 593 F.3d
1031, 1038 (9th Cir. 2010). Moreover, the Court should reject AntiCancer's request for judicial
27 notice of AntiCancer's PICs against GE Healthcare. *See* AntiCancer's Request for Judicial Notice
28 in Support of its Opposition ("Request for Judicial Notice") [D.E. 51-1]. The Federal Rules limit

1 facts that support AntiCancer's claims against GE Healthcare. Instead, they are comprised of
 2 conclusory statements that, even if accepted as true, would not establish the basis for a claim of
 3 infringement, such as:

- 4 (i) statements by GE Healthcare that its imagers "meet a full range of life science
 research applications, including 'laboratory imaging of colorimetric, fluorescent,
 and chemiluinescent [sic] samples[s]" and that "GE Healthcare customers will
 find an imaging system to suit their imaging needs[]'" (*see* AntiCancer's
 Supplement of GE Healthcare Stand-Alone Evidence [D.E. 51-5] at 1);
- 5 (ii) statements by GE Healthcare promoting the LAS 4000 as a "single platform
 for multiple imaging applications," and describing it as a "fully equipped imager
 that in addition performs ultraviolet (UV) and visible (RGB) fluorescence
 imaging[]" (*Id.* at 1-2);
- 6 (iii) references in GE Healthcare manuals contain to green fluorescent protein
 ("GFP") and technical instructions to use the imaging systems for imaging GFP;
 (*Id.* at 2); and
- 7 (iv) contact information in GE Healthcare publications "enabling users to contact
 GE Healthcare for additional information []" (*Id.* at 4).

8 From this, AntiCancer speculates that in the context of the current state of the art, the
 9 various references to fluorescent imaging and the proper technical specifications for using the
 10 Fujifilm image analyzers to perform fluorescent imaging, when combined with GE Healthcare's
 11 offers to sell the Fujifilm image analyzers, would somehow cause GE Healthcare's customers to
 12 infringe the very specific methods claimed in the patents-in-suit. AntiCancer cannot create the
 13 illusion of wrongdoing based on piecemeal references to non-infringing methods of fluorescent
 14 imaging and non-infringing uses of green fluorescent protein ("GFP"). Indisputably, the
 15 AntiCancer patents do not cover all uses of GFP, which is not even a proprietary chemical but
 16 occurs naturally in species of jellyfish. *See* AntiCancer Opposition at 3.

17 proper subject matter for judicial notice to facts that are "not subject to reasonable dispute" and
 18 are either "generally known" or "capable of accurate and ready determination." Fed. R. Evid.
 19 201(b); *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) ("[A] court may not take
 20 judicial notice of a fact that is 'subject to reasonable dispute'"). Infringement contentions, by their
 21 very nature, are a one-sided presentation of the evidence. In addition, the PICs are not, as
 22 AntiCancer claims, undisputed by Defendants. *See* Request for Judicial Notice at 1. GE
 23 Healthcare has not formally disputed the PICs directed against it because it had no obligation
 24 under either the Patent Local Rules for the Southern District of California or the Scheduling
 25 Order in this action [D.E. 28] to do so.

1 **C. AntiCancer Has Failed To Allege Facts That Support A Claim Of Indirect
2 Infringement Under Legal Standards That Govern Such Claims**

3 The allegations relied on in AntiCancer's Opposition demonstrate that there are no facts
4 that could establish that GE Healthcare is liable for induced or contributory infringement. As an
5 initial matter, to show direct infringement, AntiCancer identifies only its allegations that
6 "defendants have infringed the [patents-in-suit]." *See* AntiCancer Opposition at 12, citing the
7 Second Amended Complaint at 11:15, 12:15, 13:15. AntiCancer, though, provides no support for
8 this statement as to GE Healthcare.

9 For its induced infringement claim, the allegations and evidence that AntiCancer cites
10 contain no hint of GE Healthcare's having had the specific intent to encourage infringement as
11 necessary for AntiCancer to sustain its claim.⁵ *See, e.g., Hewlett-Packard*, 909 F.2d at 1470
12 (affirming the district court's finding of no inducement and holding that evidence of a sale of the
13 business division that manufactured the accused product, together with specific plans for making
14 the product and a license agreement with an indemnity clause covering accusations of
15 infringement, was insufficient to prove intent to induce). For its contributory infringement claim,
16 again contrary to AntiCancer's assertions otherwise (*see* AntiCancer Opposition at 14), it has not
17 alleged the element that the accused image analyzers are "not suitable for substantial
18 noninfringing uses," as AntiCancer agrees it would need to do, let alone facts showing as much.
19 AntiCancer Opposition at 9 (citing 35 U.S.C. 271(c)).

20 As stated in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, a case AntiCancer relies
21 on in its Opposition, patent law does not prohibit "selling an item with substantial lawful as well
22 as unlawful uses" but instead "limits liability to instances of more acute fault than the mere
23 understanding that some of one's products will be misused." 545 U.S. 913, 932-933 (2005).
24 Moreover, "ordinary acts incident" to the distribution of products with infringing potential, "such
25 as offering customers technical support or product updates," like those offered by GE Healthcare,

26 ⁵ Liability for inducement of infringement does not turn not on an amorphous standard based on
27 the "context in the current state of the art," as AntiCancer's PICs imply. *See* AntiCancer's
28 Supplement of GE Healthcare Stand-Alone Evidence [D.E. 51-5]. The test is not whether the
accused party's materials "suggest" how to implement a patented method, but instead require a
more stringent finding of specific intent on the part of the accused.

1 cannot support liability. *Id.* at 937. Consequently, AntiCancer cannot maintain its claims against
 2 GE Healthcare based on the single fact that GE Healthcare is offering for sale Fujifilm image
 3 analyzers that are not capable by themselves of infringing the patents-in-suit and are instead
 4 capable of multiple non-infringing uses.

5 Accordingly, setting aside AntiCancer's allegations against Fujifilm, the allegations of the
 6 Second Amended Complaint are indistinguishable from the allegations deemed insufficient in the
 7 cases cited in GE Healthcare's Motion to Dismiss. For example, AntiCancer's conclusory
 8 allegations that GE Healthcare "is actively inducing and/or contributing to infringement of the
 9 [patents-in-suit]" (*see* SAC at ¶¶ 46, 55, 64) mimic its allegations against the defendants in
 10 *AntiCancer Inc. v. Xenogen Corp.*, that "[e]ach of the defendants has directly infringed the []
 11 Patent and has indirectly infringed the [] Patent by contributing to or inducing direct
 12 infringements of the [] Patent by others[,] which that court dismissed as "a bare statement of
 13 direct and indirect infringement." 248 F.R.D. 278, 282 (S.D.Cal. 2007). Indeed, AntiCancer
 14 agrees that its allegations in *Xenogen* were insufficient for purposes of the pleading standard set
 15 forth by the Supreme Court in *Twombly* (*see* AntiCancer's Opposition at 10). Its allegations
 16 against GE Healthcare are likewise insufficient.

17 Similarly, AntiCancer cannot meaningfully distinguish this case from *Li Ming Tseng v.
 18 Marukai Corp. U.S.A.*, because like the complaint there, AntiCancer's Second Amended
 19 Complaint does nothing to identify *facts* establishing that image analyzers sold by GE Healthcare
 20 have been used by GE Healthcare customers to infringe the patents-in-suit. *See Li Ming Tseng v.
 21 Marukai Corp. U.S.A.*, Case No. CV 09-0968, Order Granting Motion to Dismiss at 2 (C.D. Cal.
 22 Nov. 13, 2009). Notably, the plaintiff in *Li Ming Tseng* went on to amend its complaint to
 23 specifically allege how the accused goods purportedly read on the claim elements of the patent-
 24 in-suit. *See Li Ming Tseng v. Marukai Corp. U.S.A.*, Case No. CV 09-0968, First Amended
 25 Complaint (C.D.Cal. Nov. 25, 2009) (D.E. 20). AntiCancer, on the other hand, has not managed
 26 to do that even in its lengthy PICs, thus disposing of AntiCancer's assertion that its PICs could
 27 somehow save its claims. *See* AntiCancer Opposition at 10.

28 When examined carefully, AntiCancer's claims against GE Healthcare are founded on

1 exactly the type of bald allegations that the federal pleading requirements are designed to prevent.
 2 *Iqbal* at 1950-1951; *Twombly*, 550 U.S. at 558 ("when the allegations in a complaint, however
 3 true, could not raise a claim of entitlement to relief, this basic deficiency should [] be exposed at
 4 the point of minimum expenditure of time and money by the parties and the court") (internal
 5 citations omitted). Accordingly, AntiCancer's claims against GE Healthcare should be dismissed.

6 Finally, because AntiCancer only recently amended its First Amended Complaint,
 7 demonstrating that after more than eight months of litigation against GE Healthcare it is still
 8 unable to plead sufficient factual allegations against GE Healthcare, it would be futile to again
 9 allow leave to amend. *Chang v. Chen*, 80 F.3d 1293, 1301 (9th Cir. 1996).

10

11

CONCLUSION

12

13

For the reasons set forth above, GE Healthcare respectfully requests that the Court grant
 its Motion to Dismiss with prejudice and deny AntiCancer's request for leave to amend.

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Dated: May 28, 2010

Respectfully submitted,

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Orrick, Herrington & Sutcliffe LLP

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/s/ William H. Wright

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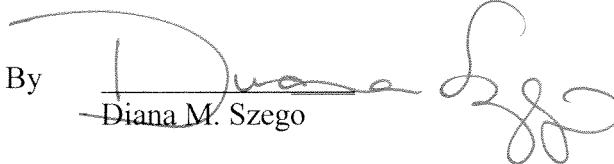
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10 Electronic Case Filing ("ECF") system, to be sent electronically to the registered participants as
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20 Respectfully submitted,

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